No. 83-56

In the Supreme Court of the United States

October Term, 1983

MARGARET M. HECKLER, Secretary of Health and Human Services,
Petitioner,
v.
COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual and SHIRLEY SORGER, an individual,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief for Respondents

RAYMOND G. HASLEY
BRIAN W. ASHBAUGH
ROSE, SCHMIDT, DIXON
& HASLEY
900 Oliver Building
Pittsburgh, PA 15222-5369
(412) 434-8600
Counsel for Respondents

QUESTION PRESENTED

May the doctrine of equitable estoppel be applied against the Secretary of the Department of Health and Human Services where the Secretary's agent, within the course and scope of his authority, acted with affirmative misconduct which misconduct induced detrimental reliance on the part of the party seeking the estoppel or where it would be manifestly unjust to sanction the Government's misconduct.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the Travelers Insurance Companies was an appellee in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

Page

STATUTES AND REGULATIONS

No. 83-56

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER,
Secretary of Health and Human Services,
Petitioner,
v.
COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual and SHIRLEY SORGER, an individual,
Respondents.

BRIEF FOR RESPONDENTS

Respondents respectfully request that this Court affirm the decision of the United States Court of Appeals for the Third Circuit in this case. That decision is recorded at 698 F.2d 615 and Appendix A, pp. 1a-33a of the Petition.

STATUTES AND REGULATIONS INVOLVED

The only statute or regulation which the case involves not previously set forth by petitioner or in respondents' Brief in Opposition to the Petition is set forth herein.

The Comprehensive Employment and Training Act of 1973 ("CETA"), P.L. 93-203, 87 Stat. 839, 29 U.S.C. §801 *et seq.*, provided in the original Act as follows:

TITLE II—PUBLIC EMPLOYMENT PROGRAMS

Statement of Purpose

Sec. 201. It is the purpose of this title to provide unemployed and underemployed persons with transitional employment in jobs providing needed public services in areas of substantial unemployment and, whenever feasible, related training and manpower services to enable such persons to move into employment or training not supported under this title.

* * *

Applications

Sec. 205. (a) Financial assistance under this title may be provided by the Secretary for any fiscal year only pursuant to an application which is submitted by an eligible applicant and which is approved by the Secretary in accordance with the provisions of this title. Any such application shall set forth a public service employment program designed to provide employment, in jobs providing needed public services, for persons residing in areas of substantial unemployment who have been unemployed for at least thirty days and, where appropriate, training and manpower services related to such employment which are otherwise unavailable, and to enable such persons to move into employment or training not supported under this title.

* * *

(c) An application for financial assistance for a public service employment program under this title shall include provisions setting forth—

* * *

(3) assurances that only persons residing within the areas of substantial unemployment qualifying for

assistance will be hired to fill jobs created under this title, and that the public services provided by such jobs shall, to the extent feasible, be designed to benefit the residents of such areas;

* * *

(6) assurances that, to the extent feasible, public service jobs shall be provided in occupational fields which are most likely to expand within the public or private sector as the unemployment rate recedes;

* * *

(11) description of unmet public service needs and a statement of priorities among such needs;

* * *

(25) assurances that jobs funded under this title are in addition to those that would be funded by the sponsor in the absence of assistance under this Act;

* * *

TITLE VI—GENERAL PROVISIONS

Definitions

Sec. 601. (a) As used in this Act, the term—

* * *

(7) "Public service" includes, but is not limited to, work in such fields as . . . health care, . . . and other fields of human betterment and community improvement.

The Medicare Provider Reimbursement Manual, HIM-15, Pt. I, §612.2, reproduced in Medicare & Medicaid Guide (CCH) ¶5461 (Aug 1968) provides:

612.2 *Seed Money Grants.*—Grants designated for the development of new health care agencies or for expansion of services of established agencies are generally referred to as "seed money" grants. "Seed money" grants are not deducted from costs in computing allowable costs. These grants are usually made

to cover specific operating costs or groups of costs for services for a stated period of time. During this time, the provider will develop sufficient patient caseloads to enable continued self-sustaining operation with funds received from Medicare reimbursement as well as from funds received from other patients or other third-party payers. (p. 6-6)

STATEMENT OF THE CASE

The Opinion of the Court of Appeals for the Third Circuit sets forth the facts, but respondents would like to emphasize the following:[1]

From the inception of the Medicare Program in 1966 until late spring of 1975, Community Health Services of Crawford County, Inc. ("CHS")[2] was a small home health care provider serving a portion of Crawford County, Pennsylvania. In the spring of 1975, CHS depended upon volunteer workers and only had five employees and a budget of about $53,000. (PRRB Record 0097-0100) At that time, CHS's sources of funds included Medicare, Medical Assistance, charities, such as United Way, and the County Commissioners. (PRRB Record 0099) Because of its charitable nature and sources of its funding, CHS could be classified as a quasi-public agency.

It was this quasi-public agency posture which caused the County Commissioners and CHS to seek ways to expand services to needy residents of the County. The County Commissioners were concerned that CHS only provided services in the western portion of the County and the residents living in the eastern portion of the County

---

[1]Reference to the Third Circuit Joint Appendix is designated C.A. App., reference to Petition Appendix is designated Pet. App., and reference to the Provider Reimbursement Review Board Record is designated PRRB Record.

[2]CHS has no parent company, subsidiaries or affiliates.

were not getting the benefit of services supported by their tax dollars. (PRRB Record 0097-0098)

Crawford County is the ninth largest county in Pennsylvania in land area and has a population of approximately 81,000 persons. The rural nature of Crawford County, the disproportionate number of elderly people, the lack of job opportunities, the large welfare load, and the shortage of adequate medical services gave a sense of urgency to the problem faced by the County Commissioner and CHS. (PRRB Record 0093-0095)

At the time John Wallach, CHS' Executive Director, was hired in May 1975, CETA funds were being made available pursuant to Public Law 93-203, 87 Stat. 839, 29 U.S.C. §801 *et seq.* Positions with CHS had been allocated under the authority of the County Commissioners for the development of new services and an expansion of the area serviced by CHS. (PRRB Record 0100-0101) People hired to fill CETA slots were hired under the public service provisions of CETA. See, for example, the document at PRRB Record 0320 entitled "Public Service Employment Program—Agent Agreement."

By using CETA employees for public service and preparing the cost accounting reports as directed by the Secretary's Intermediary, Travelers, CHS was able to expand the services it provided throughout the County. CHS was also able to introduce programs and services which had not previously been provided. This expansion of services is described in some detail in the testimony of John Wallach at PRRB Record 0101-0147. The number of units of service (visits) rose from approximately 4,000 to over 81,000 during the three years which are in dispute in this case. (PRRB Record 0128) CHS' budget also rose to approximately $900,000 from the previously mentioned $53,000.

(PRRB Record 0134) This expansion was possible because of the directions received from Travelers that the CETA payments were to be treated as "seed money" and would not reduce CHS' reasonable costs to be reimbursed by Medicare. These directions permitted CHS to obtain duplicate reimbursement for its CETA employees thereby providing additional funds to expand the non-profit services provided to the residents of Crawford County.

There is no dispute of fact that it was the duty of the Secretary's fiscal intermediary, Travelers, and its employee, Michael Reeves, to deal with CHS and that they were acting within the scope of their authority at all relevant times.

There is no dispute of fact that the relationship between CHS and Travelers was close and ongoing and that the operations of the provider required prompt and reliable decisions through the Secretary's agent. The provider had a need to know and without delay.

There is no dispute of fact that CHS' charges for services rendered under Medicare were "reasonable", normal charges and the reduction in those charges sought by the Secretary through recoupment would lessen ordinary Medicare payments by reason of the CETA payments to CHS. The denial of recoupment to the Secretary would not result in any actual loss to Medicare.

There is no dispute of fact that the Secretary's agent was fully aware of the fact that CHS intended to use duplicate payments as seed money for the expansion of non-profit public services.

There is no dispute of fact that CHS treated income that duplicated payments to CHS' employees as seed money and expended that money for the expansion of

public non-profit services by CHS in furtherance of the intent of Congress.

There is no dispute of fact that CHS did not retain the duplicate payment money. Statements in the Secretary's brief indicating that CHS retained such payments are unfounded, false and misleading.

There is no dispute of fact that CHS viewed its dealings with the Secretary's agent as a commitment or agreement on the part of the Secretary and, except for that belief, would not have undertaken the expansion of CHS' non-profit public services by hiring additional personnel which CHS otherwise could not have afforded to do.

There is no dispute of fact that essentially all of CHS' income is from federal, state and local governmental agencies with only a minor portion of CHS' income received from other sources; and those, such as United Way, are charitable organizations.

There is no dispute of fact that CHS cannot be returned to its condition prior to the action of the Secretary's agent.

There is no dispute of fact that CHS and the public, including the individual respondents, will be injured unless the Secretary is estopped.

There is no dispute of fact that the Secretary has recourse against Travelers.

There is no dispute of fact that the money sought by the Secretary is a minor amount of Medicare funds.

CHS' Wallach testified that he asked Travelers' Medicare Manager, Michael Reeves, on at least five occasions how CHS was supposed to treat the CETA payments for cost accounting purposes. The first time was prior to sub-

mitting any cost information to Travelers. Wallach was concerned with correctly calculating CHS' reimbursable costs but did not know how to calculate the costs and sought direction from Travelers. Prior to submitting any cost data on CETA employees, Travelers' Reeves instructed Wallach that the CETA payments did not have to be offset against CHS' reimbursable costs because they qualified as seed money. Travelers then approved CHS' cost reports which CHS prepared as directed by Reeves. The Secretary's regulations required Travelers to provide CHS with written notice reflecting Travelers' determination of the amount of program reimbursement and Reeves testified that that was done. 42 C.F.R. §405.1803. Thus, Travelers was obligated to provide written advice to CHS for the Cost Years in question and, pursuant to those procedures, approved CHS' cost reports prepared according to the "Reeves" procedure. (PRRB Record 0103-0107, 0185-0189, 0196-0197)

Travelers first notified CHS in October 1977, the last month of CHS' 1977 Cost Year, that there was a problem with the cost accounting procedure directed by Reeves. This was approximately two and one-half years after Wallach's first inquiry and Reeves' first response and after CHS had used the additional income to expand the services that it provided to the residents of Crawford County. The additional income was used to start-up various governmental approved programs until the programs became self-sustaining through the Medicare cost reimbursement procedures. The CETA payments were the only means for CHS, a non-profit agency, to accomplish this expansion. (PRRB Record 0105-0108, 0185-0189)

Reeves testified that he knew of no official policy concerning CETA payments at the time he was first questioned by CHS. (PRRB Record 0185-0186, 0189-0193, 0197-

0198) In hindsight, Reeves was still unable to identify any policy during this time period. (PRRB Record 0198-0199) There was no other testimony at any time concerning petitioner's policy.

Reeves further testified that the procedure, which intermediaries were to follow to obtain answers to questions for which there was no guidance, was to pass the questions along to the regional office of the Bureau of Health Insurance (an agency of the Secretary now Health Care Financing Administration). (PRRB Record 0179)

Reeves did not pass along CHS' repeated inquiries for over two years yet advised CHS during this time not to offset the CETA payments.

Throughout all of the proceedings in this case, there has never been an allegation or even an innuendo that CHS used the additional funds for wrongful purposes or purposes not intended by Congress.

Because of its decision on the estoppel issue, the Third Circuit did not reach any of the other issues presented by respondents in their appeal from the judgment of the District Court.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Third Circuit should be affirmed. The undisputed facts established unconscionable conduct on the part of the Secretary and Travelers which, unless estopped, would have imposed an undeserved injury on respondents and the public as well. Respondents at all times acted in good faith in seeking and following the directions provided by Travelers as the Secretary's agent and respondents should not be punished for having justifiably relied on and followed those directions. The public and not CHS gained from the Medicare payments.

Decisions in other cases throughout the land reflect a consensus that at least in exceptional circumstances, the doctrine of estoppel should be available against the government.

The ancient concept of governmental immunity from wrongdoing is outmoded and unacceptable in our society.

In deciding upon a policy applicable throughout the land, the judicial branch must have the last word as to the law rather than administrative agencies and where misleading or wrongful government conduct has induced reasonable detrimental reliance, the government should be estopped like any other party unless the government can show exceptional circumstances which would require a Court to withhold equitable relief.

ARGUMENT

THE SECRETARY OF HEALTH AND HUMAN SERVICES MAY BE ESTOPPED BECAUSE HER AUTHORIZED AGENT REPEATEDLY AND KNOWINGLY VIOLATED ITS STATUTORY DUTY TO COMMUNICATE QUESTIONS FROM THE PROVIDER TO THE SECRETARY ASKING FOR GUIDANCE CHOOSING INSTEAD TO ANSWER QUESTIONS FOR WHICH THERE WAS NO GUIDANCE AND TO INDUCE THE PROVIDER TO RELY UPON THE ANSWERS TO ITS DETRIMENT

The essence of the Secretary's position in this case is stated succinctly by Raoul Berger in his article, *Estoppel Against the Government*, 21 U. of Chi. L. Rev. 680 at 707 (1954):

> The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice.

This case presents the Court with a policy question as to whether government agencies must act responsibly in dealing with the public or whether there is no limit whatsoever on the government's power to injure and damage members of the public.

A. The Third Circuit Decision Correctly States the Law and Should be Affirmed

> Since time immemorial it has been argued that "The King can do no wrong;" therefore, his subjects can neither complain of, nor be indemnified for, the "wrongs" of the King nor for the wrongs of the King's agents. In a different context, we are now asked to affirm a somewhat similarly archaic concept in favor of the United States government, regardless of its effect on innocent persons. . . . In effect, the government seems to argue that "We, just like the King and his agents, can do no wrong, regardless of the grievous consequences we cause innocent people."

Community Health Services etc. v. Califano, 698 F.2d 615 at 616-617; Pet. App. at p. 2a.

The Third Circuit recognized the significance of the Secretary's position in holding that the government's authority to avoid the consequences of its actions is not unlimited and that limits to such abuse of authority exist. To have decided this case in favor of the Secretary, the Third Circuit would have had to grant the Secretary unbridled authority to disavow any actions taken by her or her agents without regard of the consequences to the public. This would have been contrary to the philosophy of this country and our concept of a responsive, responsible government. Clearly, the Third Circuit's decision is proper and within the system of checks and balances established in the Constitution.

The principal recent cases considered and distinguished by the Third Circuit are *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981), *reh. denied*, 451 U.S. 1032 (1981); *INS v. Hibi*, 414 U.S. 5 (1973),*reh. denied*, 414 U.S. 1104 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961); and *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). CHS believes the Third Circuit's analysis of each of the cases reflects an accurate and correct statement of the law. Moreover, CHS believes that while further justification for the Third Circuit's position on each of the cases is unnecessary, such comments would lead to a better understanding of the decision.

Federal Crop Insurance Corp. v. Merrill, *supra*, turns on a question of constructive knowledge of the regulations. There appears to be no dispute in the clarity of the regulations barring the insurance on spring wheat which is reseeded on winter wheat acreage. The regulations were incorporated by reference into the application for insurance. Additionally, the agent for the government corporation was ignorant of that particular provision of the regulations.

In this case, neither circumstance is present. The testimony of the agent, Reeves, clearly establishes his knowledge of the requirement to act as a channel of communication between providers and the Secretary. Reeves testified that there was no guidance at all in 1975 when CHS first asked the question. In hindsight, at the time of the PRRB Hearing, Reeves still could not identify any guidance. As the evidence demonstrates, the regulations and guidelines were so unclear that Reeves and Travelers were unable to resolve the question, the Bureau of Health Insurance (now Health Care Financing Administration) regional office was unable to answer the question, and the central office of the

Health Care Financing Administration had to go outside the Department to the Department of Labor in order to reach a conclusion that CETA payments should be offset. (PRRB Record at 0275-0276) Thus, it seems difficult to believe that CHS could have gone to any of the Secretary's guidelines or regulations to determine that CETA payments should not be offset. Further, the Secretary fails to cite any specific guidelines or regulations that deal with CETA payments in connection with Medicare reimbursement and CHS does not concede that the Secretary was and is entitled to offset CETA payments under the cost accounting procedure.

Montana v. Kennedy, supra, was distinguished because of CHS' inability to assert its rights in any other way than by using its channel of communications. There were no guidelines, regulations, etc. The Third Circuit pointed out that CHS made inquiry into the only governmental source of information available. Moreover, the Secretary seems to ignore the testimony of Reeves when he said there was no guidance at all from the Secretary on the treatment of CETA payments. There was no source of information except through CHS' channel of communication, Travelers. The court in *Montana v. Kennedy, supra*, refused to inquire whether the government could be estopped reasoning that the advice of the American Consular Officer fell far short of misconduct that might estop the government. *Montana v. Kennedy* is also distinguishable because of the time period involved and the number of inquiries made by CHS. CHS was waving a flag in front of the Secretary's agent who was advising CHS over a two year period of time that the method of not offsetting the CETA payments was proper. CHS made inquiries, submitted its cost reports in accordance with the directions it received and had those cost reports approved.

The Third Circuit distinguished *INS v. Hibi, supra*, because the government did not make it's representative available and did not publish the rights afforded under the Act in question and thus no advice at all was given, nor, apparently was any found to be required. Additionally, as in *Federal Crop Insurance Corp. v. Merrill*, reading the law or the regulations would have made it clear that the time for applying for citizenship under the particular act involved was limited. In this case, the Third Circuit reasoned that the Secretary made her agent available for consultation and CHS consulted the agent and was given the advice on which CHS relied. Moreover, reading the law or regulations would not have answered CHS' question. Thus, *INS v. Hibi* is also distinguishable on these grounds from the circumstances faced by CHS.

The Third Circuit readily distinguished *Schweiker v. Hansen* because the agent did not cause the respondent to take action or fail to take action. Additionally, the respondent was able to correct the situation at any time. Such is not the case with CHS. CHS obtained approval prior to its actions for which the Secretary now seeks to penalize CHS and CHS can not be returned to it's prior condition. Thus, if anything, the Secretary waived her right to assert a claim of overpayment up to the time of notice to CHS of her changed position.

Another ground for finding there was no affirmative misconduct in *Schweiker v. Hansen* was that the majority in the Court of Appeals agreed that the government agent's conduct was less than affirmative misconduct. This agreement is acknowledged by this Court at 450 U.S. at 789. Thus, if the standard is affirmative misconduct, *Schweiker v. Hansen* did not rise to that threshold. Here, the Third Circuit clearly found affirmative misconduct. Thus, a different theory is presented. There is no speculation as to

what Reeves thought. He testified that he knew there was no guidance and that he knew that the procedure was to make inquiry of the Health Care Financing Administration to determine the Secretary's position. It is equally clear that he did not follow this procedure for a period of time in excess of two years during which CHS used the seemingly extra money to provide additional needed services, the cost of which cannot now be recouped by CHS to repay money allegedly owed to the Secretary. Neither Travelers nor the Secretary has ever given any explanation for the delay in obtaining a response from the Health Care Financing Administration.

INS v. *Miranda*, *supra*, was distinguished by the Third Circuit on the grounds that in *Miranda* the evidence did not establish that the government failed to fulfill its duty whereas here Travelers' duty was clear and the evidence establishes that Travelers knowingly failed to perform that duty. Reeves' testimony is unequivocal. He knew of the requirement to act as a channel of communication between the provider and the Secretary for questions raised by the provider. He knew that the Secretary had not issued any guidance as to the treatment of CETA payments. And, he failed to communicate CHS' question to the Secretary for a period of time in excess of two years. It is also undisputed that in the absence of any guidance from the Secretary, Reeves provided the guidance that evolved into the dispute in this case. *Miranda* is further distinguishable because the estoppel question was not raised until the case was on appeal and the parties were unable to develop any factual record on the issue. Thus, the question of the reasonableness of the 18 month processing time by INS was unclear. No evidence was produced because it was not in issue prior to appeal. Here, however, the Secretary, through Travelers, had the opportunity to fully

develop the record and explain the delay but failed to do so.

The dissenting opinion from the Third Circuit adds little to an understanding of this case. The majority points out the shortcomings of the dissenting opinion. Additionally, the majority's discussion of the five recent estoppel cases before this Court demonstrates that this case is very different and clearly establishes the inequitable acts and the affirmative misconduct of the Secretary through her agent.

Even the dissent's argument concerning substantive entitlement misses the mark. CHS is entitled to claim as costs for purposes of its cost accounting the salaries paid to everyone on its payroll, including the CETA employees on the payroll. The only difference in the position taken by the Secretary is that before the final sum for reimbursement is established, the CETA payments must be deducted. Thus, CHS is substantively entitled to claim the costs but must reduce the figure under the Secretary's procedure on the theory that the CETA payments are restricted rather than general purpose grants. (PRRB Record 0276) Parenthetically, it would seem very clear that a donor would not likely make a restrictive gift if he or she knew that to do so would reduce payments of other income due from a governmental agency. In reality there is no basis for the dissent's statement concerning substantive entitlement. Additionally, the dissent completely ignores the seed money exception to restricted grants that even the Secretary acknowledges as a valid exception to her claim to receive the benefit of others' gifts. Neither the majority nor the dissent reached this issue. Thus, the dissent's substantive entitlement theory seems to have little merit.

In the attempt to couple the archaic "raid on the public treasury" concept with the substantive entitlement the-

ory, the dissent fails to address the Trust Fund or insurance fund established under the Medicare Act. This is not a raid on the public treasury. If the government were a private insurance company, this would probably be characterized as a cost of doing business. While Congress may eventually have to appropriate funds from the general revenues to shore up the Trust Fund, such action has not yet been taken nor could it without changes to the law. Thus, any reference to a raid on the public treasury is totally inaccurate and overstates what is here involved.

The practical effect of overturning the Third Circuit's decision in this case would be unconscionable. First, it would prolong this litigation disproportionate to the sum of money involved because the Third Circuit would then have to consider each of the remaining issues not addressed because of its decision regarding estoppel. Second, overturning the estoppel issue could defeat the Congressional purpose of permitting the Secretary to administer the program through intermediaries. The Secretary's position that "you cannot trust the government" would be clearly established and it seems unlikely that any provider would entrust a serious matter to an intermediary. The risk to the provider would be too great. Consequently, the Secretary would be forced to replace intermediaries with her own people contrary to the intent of Congress expressed in the Medicare Act authorizing the Secretary to manage this program with intermediaries.

Finally, overturning the Third Circuit's decision would injure CHS, the individual respondents and the public which CHS serves and create a severe problem for the Secretary, the individual respondents, the public and CHS. As a non-profit agency engaged in public service for the needy, CHS is reimbursed for specific services and the funds received by CHS are not intended to lessen pay-

ments by the Secretary for normal charges. Similarly, charitable funds are not intended for the government. As for the individuals served by CHS, the failure to receive services can be a matter of life and death. See pages 21-22, *infra*.

In conclusion, respondents believe that the Third Circuit correctly decided this case and should be affirmed.

B. Respondents Should not be Punished for Outrageous Conduct of the Government and/or Travelers

The Secretary's brief is built upon the myriad of regulations most of which are inapplicable in this case because of the single issue of government estoppel presently before the Court. For example, the question of whether the CETA payments were properly seed money was not reached by the Third Circuit and thus the Secretary's discussion of this issue is superfluous and only tends to confuse the question which this Court must answer.

With respect to the Secretary's many references to regulations, the sanctity of those regulations and of the requirement for blind adherence to them, nowhere does the Secretary suggest or even hint that the regulations may be confusing, ambiguous or just plain wrong. Yet on the very question involved in this litigation, the regional office of the Health Care Financing Administration was unable to answer the question concerning the cost accounting treatment of CETA payments. The regional office had to contact its central office who in turn could not answer the question without going outside the Department of Health and Human Services to the Department of Labor. This merely underscores CHS' need for assistance in interpreting and understanding the correct cost accounting measures it was to apply when it first received the CETA payments in mid-1975.

In seeking help on this matter, CHS followed the mandated procedure of going to Travelers for the correct cost accounting treatment. CHS was fully entitled to expect that Travelers, if it had received no guidance from the Secretary, would obtain such guidance thereby serving as a channel of communications. As the undisputed facts show, Travelers did not act as a channel of communications but directed CHS not to offset the CETA payments for a period in excess of two years. Travelers' decision to follow the regulations and its contract and ask for the guidance from the Secretary came two years too late.

There is an additional reason for viewing Travelers' conduct with suspicion. Even assuming that the Secretary is correct in stating that CHS could have gone direct to the Health Care Financing Administration, Travelers undertook to provide the answer and for that reason was bound to use due care. There is no question that Travelers failed to perform this duty properly. The decisons at each level have so held. For example, the District Court held:

> "In this case there is no question that Michael Reeves gave incorrect advice to the provider and approved cost reports reflecting that erroneous advice." (Pet. App. 46a)

If the Secretary feels compelled to blindly and rigidly enforce her regulations, then she should start with Travelers because Travelers knowingly and repeatedly violated statutory, procedural and contractual requirements. At a minimum Travelers was grossly negligent in not making inquiry to the Secretary which would give the Secretary a contractual remedy against Travelers. In reality, however, Travelers' conduct was much more egregious. Reeves knew the procedures, knew there was no guidance from the Secretary but did not report this to CHS. Instead, he told CHS what to do with the full realization that CHS

intended to rely on the response. Reeves then compounded this by approving CHS' cost reports for over two years. Query, if Reeves'/Travelers' actions were wrong, should they be permitted to deliberately violate the law and then use CHS as a scapegoat?

Here, the culpability of Travelers seems obvious yet the Secretary has made no attempt to enforce the indemnity provision under its contract with Travelers. Surely that indemnity provision was placed in the intermediary contract to cause the intermediaries to toe the line and give recourse to the secretary. It is unconscionable to hold CHS liable for Travelers' conduct. It violates all standards of equity and fair dealing. The Secretary argues that she must enforce the law against CHS, but ignores enforcing her contract with Travelers. The right to collect from Travelers also negates the argument that a failure to recover from CHS amounts to a raid on the public treasury because there could be no loss if the Secretary enforces the obligation.

Equitable estoppel which is asserted here against the Secretary transcends the Regulation upon which the Secretary relies. To permit the Secretary to avoid the consequences of the conduct of her agent on the grounds that CHS had no right to rely upon Travelers' directions because of the three-year reopening provisions totally ignores the principles of equity and the facts. If estoppel is found proper of what importance is the three year time period? The time limitation could be modified or even eliminated by agreement of the Secretary's agent.

Here, there is no question that CHS had neither actual nor constructive knowledge of any policy or guideline of the Secretary's other than that received from Travelers. As previously described, the regulations and/or guidelines are so unclear that even the Secretary's experts could not read-

ily answer the question. Moreover, the Secretary has not pointed to any guideline, regulation or documentary evidence of record that supports her position that guidelines were available with respect to CETA payments. On the other hand, the undisputed testimony of Reeves is that there was no statement of policy until the end of the period involved herein. (PRRB Record 0179) Further, by examining the letter from the Health Care Financing Administration setting forth the policy at the end of the period in dispute, it seems logical to expect the Secretary to reference any prior policy. No such policy is referenced. In fact, because the letter from the Health Care Financing Administration states that it had to go outside the Department of Health and Human Services to answer the question, the clear implication is that there never was any policy. See Health Care Financing Administration letter dated September 20, 1977. (PRRB Record 0276) It seems likely under this scenario that the Secretary first established the policy in 1977 and is now attempting to apply this policy retroactively against CHS under the guise of reopening within a three-year period.

To permit the Secretary to apply such a new policy retroactively would not only be in violation of the law but, would be manifestly unjust because no new facts were introduced. The circumstances of the CETA payments were fully disclosed in 1975 and remained unchanged throughout the period in dispute. Finally, CHS' right to rely on Travelers' statutory obligation to serve as a channel of communication overcomes the Secretary's three-year reopening argument and clearly focuses the Court's attention on the manifest injustice to CHS.

The consequences of reversing the Third Circuit's decision would be immeasurable. To repay the alleged overpayments, CHS would have to take money from its

deficit funding sources (it cannot obtain it from Medicare) thereby depriving non-Medicare eligible persons of needed services. Even Reeves admitted that if the CETA payments were offset (recoupment permitted) the Medicare reimbursements would be artificially lowered by shifting the cost to individuals not covered by the Medicare Act. (PRRB Record 0204-0205) This would judicially authorize a violation of the Medicare Act 42. U.S.C. §1395X(v)(1)(A)(i). This problem does not occur where the provider is a for-profit agency because profits can be used to repay the overpayment without depriving persons of needed medical services. Thus, it would appear that the Secretary's regulations do not apply with equal force to all providers. There is a significant discrepancy as the regulations are applied to charitable and for-profit agencies.

In the event CHS must repay the alleged overpayment to the Secretary, it may likely find itself without sufficient funds to do so because agencies such as United Way would be unlikely to consent to the use of the charitable contributions provided to CHS. Without any other means of repayment, the Secretary would most likely seek a self-help solution and retain current Medicare payments due to CHS. In this event, the result predicted by the District Court when it entered the Temporary Restraining Order would occur. (C.A. App. 69a-71a) With CHS' doors closed, the Secretary likely would have a major medical crisis on her hands because of the large area of Crawford County which has been declared medically underserved. (PRRB Record 0278-0281) The specific nature of the problems which would occur are well described in the letters enclosed as Exhibit B to Respondent's Motion for Temporary Restraining Order. (C.A. App. 35a-68a)

C. The Court Must Determine Whether Limits Can Be Placed On The Federal Government To Prevent It From Dealing Irresponsibly And From Injuring Others Solely Because It Is The Federal Government

To date, this Court has declined to state directly whether the government can be estopped, and if so, under what circumstances. The five most recent cases in which this Court specifically addresses the estoppel issue have been previously discussed and will not be repeated. In four of the cases, *INS v. Miranda, supra; Schweiker v. Hansen, supra; INS v. Hibi, supra;* and *Montana v. Kennedy, supra,* the Court alluded to but did not reach the question of whether affirmative misconduct in a particular case would estop the government. The theory on which the Third Circuit decided this case was affirmative misconduct but it also refused "to sanction such a manifest injustice occasioned by the Government's own misconduct." (Pet. App. 21a)

1. Can the Government be Estopped?

a. Predicate Cases

The purported rule against estoppel of the government finds its roots in the early case of *Lee v. Munroe,* 11 U.S. (7 Cranch) 366 (1813). In that case, plaintiff sought to estop the government from asserting that a particular communication from the government's agent to plaintiff was gratuitous and not within the sphere of the agent's official duties. Additionally, the case turned on a question of mistake and nothing more. Interestingly, the Court distinguished the question of mistake from fraud opining that where the agent acted fraudulently, the agent may be personally liable to the plaintiff. The case was clearly before the Court on the question of mistake.

While there were several intervening decisions, *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917), is a case frequently cited for the position that the government cannot be estopped. In *Utah Power*, this Court said that the United States was not bound nor estopped by acts of its agents in entering into an agreement to do or cause to be done something that the law does not permit. The particular holding of the Court in *Utah Power* differs little from *Lee v. Munroe* which is cited in support thereof. The next case or cases which are frequently cited in support of the traditional rule that the government cannot be estopped are *Federal Crop Insurance Corporation v. Merrill, supra; Montana v. Kennedy, supra; INS v. Hibi, supra; Schweiker v. Hansen, supra;* and *INS v. Miranda, supra*, which were discussed in the Third Circuit opinion and earlier in this brief. The most recent of these cases appear to have picked up on an area left open in *Lee v. Munroe*, that of conduct which is more flagrant than mere inadvertance.

The rationale behind the traditional rule of not estopping the government resides in the perception that federal rights would be forfeited without sovereign consent. This rationale has not served to prevent circuit courts of appeal from finding grounds to estop the government where, in many cases, the conduct has been characterized as "affirmative misconduct."

A commentator has stated as to the present permissibility of applying the doctrine of equitable estoppel against the government:

> Over several decades, the federal law on the question of whether the government may be estopped has been evenly shifting from never to sometimes. Until 1981, the movement has been clearly

> in the direction of more often allowing estoppel, although answers to questions of whether particular courts will allow estoppel on particular facts have usually been unclear. The lower courts over two or three decades have appeared to be more liberal in allowing estoppel than the Supreme Court . . . .
>
> . . . How much of the law of lower courts estopping the government is dislodged by the *Hansen* decision is difficult to determine. The Court's summary action, without a fully reasoned opinion, leaves many uncertainties. Yet a good deal of law that the government may be estopped in particular circumstances probably still stands. The long term view of most judges of lower courts—a view adopted even in the face of some Supreme Court authority to the contrary—may be based on understanding that will continue to be felt.
>
> More than the latest Supreme Court pronouncement must be considered, because (a) the law of estopping the government has never been stationary and is unlikely to become so, (b) only a portion of such estoppel law is susceptible to answers in blacks and whites, (c) the Supreme Court's five main opinions on the subject lack consistency, and (d) some recent decisions estopping the government might win approval of the Supreme Court, *for it has never been said that the government may never be estopped.*

K. Davis, Administrative Law Treatise §§ 17.03-04, at 252-253 (1982) ("1982 Ad. Law Supp") (Emphasis added.)

Summarizing his conclusion on the subject, Davis states:

> Courts once commonly asserted flatly that the government may not be estopped: "it is settled that

> estoppel may not be asserted against an agency of the United States government . . ." *Spencer v. Railroad Retirement Board*, 166 F.2d 342, 343 (3rd Cir. 1948). In the five *Hansen* opinions, two in the Supreme Court and three in the Second Circuit, no such statement appears. *The present law probably is that the government may be estopped when justice so requires*, except that in the *Hansen* case, the Supreme Court seemingly failed to discuss the question of whether justice required estoppel of the government.

Id. § 17.01, p. 252 (emphasis added).

The concurring opinion of Judge Newman in the United States Court of Appeals for the Second Circuit in the *Hansen* litigation offers a comprehensive recent survey of the permissibility of applying the doctrine of equitable estoppel against the government. Therein, Judge Newman states:

> While emphatic rejections of estoppel against the Government occasionally appear in passing phrases, see *Dix v. Rollins*, 413 F.2d 711, 716 (8th Cir. 1969); *Udall v. Oelschlaeger*, 389 F.2d 974, 977 (D.C. Cir.) *cert. denied*, 392 U.S. 909 (1968), no court of appeals has ruled that estoppel would be unavailable in all circumstances. On the contrary, no fewer than eight circuits, including this one, have stated that there are some circumstances in which the government will be estopped. *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2nd Cir. 1976); *Walsonavich v. United States*, 335 F.2d 96 (3rd Cir. 1964); *Tuck v. Finch*, 430 F.2d 1075 (4th Cir. 1970); *Simmons v. United States*, 308 F.2d 938, 945 (5th Cir. 1962); *United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966); *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1979); *Massaglia v. Commissioner*, 286 F.2d 258, 262 (10th Cir. 1961) (dictum); *Semann v. Mumford*, 335 F.2d 704,

706 (D.C. Cir. 1964). The principle is particularly well established in this Circuit. See *Corniel-Rodriguez, supra*, *Miller v. United States*, 500 F.2d 1007 (2nd Cir. 1974); *Podea v. Acheson*, 179 F.2d 306 (2nd Cir. 1950) (conclusion that plaintiff's waiver of citizenship was not binding for reason of duress supported by erroneous nature of government advice to plaintiff); *Tonkonogy v. United States*, 417 F. Supp. 78 (S.D.N.Y. 1976). These decisions have not purported to evolve a standard for determining when the Government is estopped. That task requires further analysis of the cases, those that have upheld an estoppel and those that have not.

Hansen v. Harris, 619 F.2d 942, 958-959 (2nd Cir. 1980), *rev'd*, 450 U.S. 785 (1981), *reh. denied*, 451 U.S. 1032 (1981) (Newman, J., concurring) (footnotes omitted).

Still other circuit cases support the position that under some circumstances the government can be estopped. *Eichelberger v. Commissioner of Internal Revenue*, 88 F.2d 874 (5th Cir. 1937) (government precluded from changing its position); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970) (government estopped to deny plaintiffs' priority for an oil and gas lease because of misleading assurances); *Man Loading and Management Associates v. United States*, 461 F.2d 1299 (Ct. Cl. 1972) (government estopped from disavowing promise regarding renewal of contract); *Sylvania Electric Products, Inc. v. United States*, 458 F.2d 994 (Ct. Cl. 1972) (government estopped from disavowing oral understanding reached at bidders' conference); *U.S. v. 31.43 Acres of Land*, 547 F.2d 479 (9th Cir. 1976) (equitable estoppel analysis applied to direct assurances entering into construction contracts would increase value of remaining lands); *California Pacific Bank v. Small Business Administration*, 557 F.2d 218 (9th Cir. 1977) (estoppel

should be available where justice and fair play require it); *Becker's Motor Transportation, Inc. v. Department of Treasury*, 632 F.2d 242 (3rd Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (IRS estopped from collecting prepetition interest from the debtor's estate); *Mendoza-Hernandez v. INS*, 664 F.2d 635 (7th Cir. 1981) (affirmative misconduct which actually prejudiced alien would estop the government from denying relief requested); *Yang v. INS*, 574 F.2d 171 (3d Cir. 1978) (proof of affirmative misconduct on part of INS would entitle petitioner to relief); *Portman v. United States*, 674 F.2d 1155 (7th Cir. 1982) (estoppel may be available against the government); *Dana Corp. v. United States*, 200 Ct. Cl. 200, 470 F.2d 1032 (1972) (government estopped from denying authority of contracting officer's authority); *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970) (government was not immune from estoppel where the government was seeking specific performance of a contract); *Schuster v. Commissioner of Internal Revenue*, 312 F.2d 311 (9th Cir. 1962) (government estopped to recover a tax deficiency where property from an estate was distributed in reliance upon a revenue ruling); *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964) (government estopped from asserting statute of limitations); *United States v. Fox Lake State Bank*, 366 F.2d 962 (7th Cir. 1966) (government estopped from bringing an action under the Civil False Claims Act); *United States v. LAZY FC Ranch*, 481 F.2d 986 (9th Cir. 1973) (government estopped where government's wrongful conduct threatens to work a serious injustice); *Corniel-Rodriquez v. INS*, 532 F.2d 301 (2d Cir. 1976) (government estopped from deporting alien because Consul failed to warn of forfeiture if alien married before being admitted to the United States).

b. *Considerations for Estopping the Government*

What may be termed generally as wrongful conduct on the part of the government seems to be the focus in all of the cases in which a court has determined that the government may be or is estopped. On the other hand, in cases which find that estoppel is inappropriate, the focus seems to be founded upon Constitutional principles. The emphasis of both the majority and the minority opinions from the Third Circuit in this case support this theory.

Those decisions which hold generally that the government cannot be estopped distinguish the no estoppel decisions from the estoppel decisions generally along four lines. First, the courts discuss the distinction between the government acting pursuant to its sovereign functions as opposed to a proprietary function. But, what of the immigration cases that have been before this Court where there is at least an implication that affirmative misconduct will estop the government? Second, the no estoppel cases identify the government's responsibility to protect the treasury on behalf of the people. The argument proceeds much as the dissenting opinion in this case proceeds. But, how will the government agents and employees ever learn to do their job correctly if there is no fear of punishment? Does this not promote incompetency? Would such a raid be any more dangerous to the Treasury than payments made to the victims of negligence on the part of a government employee by virtue of the Federal Tort Claims Act, 28 U.S.C. §2671 *et. seq.* Third, sovereign immunity is usually raised. The argument is that the government can only be charged when it consents and that unless there is a specific provision in the law, consent cannot be implied. Many times

this argument is negated if the particular government agency has authority to waive the resulting actions as in the instant case. Courts have also avoided the sovereign immunity argument where a larger congressional purpose is found which would justify estopping the government. Finally, arguments will center on a separation of powers and the need to let the executive branch enforce the laws enacted by the Congress. But, in the Constitutional system of checks and balances, do not the courts have the final authority as to matters of law to prevent or place limits on the other branches when they overstep their bounds?

2. ***Threshold Requirements to Estop the Government***

a. *Affirmative Misconduct*

As an initial matter, this Court's consistent use of a concept of "affirmative misconduct" by the government in discussing the possibility of applying the doctrine of equitable estoppel against the government seems to establish that the threshold test is whether the government engaged in "affirmative misconduct." As Davis has stated: "Law that only 'affirmative misconduct' may estop the government seems to be growing." 1982 Ad. Law Supp., *supra* at 255. A review of recent cases supports that conclusion. For example, in *California Pacific Bank v. Small Business Administration*, *supra*, the court stated: "[W]e still require, as a threshold showing, that to estop the government from raising the defense of illegality, one must demonstrate that the agent's actions constituted 'affirmative misconduct' ". See also *Leimbach v. Califano*, 596 F.2d 300 (8th Cir. 1979) and *Cornicl-Rodriguez v. INS*, *supra*.

b. *Justified Detrimental Reliance*

A review of recent cases also demonstrates that invariably the courts have required that the party asserting estop-

pel must have justifiably relied to its detriment. See, for example, *U.S. v. Browning*, 630 F.2d 694 at 703 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981); *Union Equity Cooperative Exchange v. C.I.R.*, 481 F.2d 812, 817 (10th Cir. 1973), *cert. denied*, 414 U.S. 1028 (1973); *Lawrenceville Nursing Home, Inc. v. Schweiker*, 528 F. Supp. 1370 (D.N.J. 1982), *aff'd*, 696 F2d 983 (3d Cir. 1982); *Douglas v. U.S.*, 658 F.2d 445 (6th Cir. 1981).

It is clear that there must be a reasonable basis for reliance which has detrimental results. In other words, if contributory negligence is present, a court may refuse relief. See, *e.g.*, *Hallenbeck v. Kleppe*, 590 F.2d 852 (10th Cir. 1979). A Third Circuit case characterized this requirement as follows:

> "[M]ere detrimental reliance is insufficient to support a claim of estoppel. That reliance must have been reasonable.
>
> 'One who claims that the benefits of an estoppel on the ground that he has been mislead by the misrepresentations of another must not have been mislead by his own lack of reasonable care and circumspection. A lack of reasonable diligence by a party claiming an estoppel is generally fatal. If a party conducts himself with careless indifference to the means of information reasonably at hand or ignores highly suspicious circumstances, he may not invoke the doctrine of estoppel.' 28 Am. Jur.2d §§ 79-80."

Brown v. Richardson, 395 F. Supp. 185, 191 (W.D. Pa. 1975). Significantly, this statement of law is derived from 28 Am. Jur.2d §§ 79-80. The sentence following the above-cited quote in 28 Am. Jur.2d § 80 clearly equates good faith with the exercise of reasonable diligence and reliance upon the words and conduct of the other party. In this case the PRRB concluded that CHS acted in good faith which

would seem to establish the reasonable diligence and reliance standard.

It is also noted that the First Circuit has indicated that (at least in immigration cases), government misconduct must have induced the petitioner to act in a way that he would not otherwise have. *Akbarin v. INS*, 669 F.2d 839, 843 (1st Cir. 1982).

c. *Other Requirements for Which Proof has Sometimes Been Required*

Certain courts have also required proof of the existence of other factors before the government will be equitably estopped.

Particularly in the United States Court of Appeals for the Ninth Circuit the following elements are required:

> (1) the party to be estopped must have known the facts;
>
> (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended;
>
> (3) the latter must have been ignorant of the true facts; and
>
> (4) he must have relied on the former's conduct to his injury.

See, *e.g.*, *U.S. v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *U.S. v. Harvey*, 661 F.2d 767 (9th Cir. 1981); *U.S. v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *New York Athletic Supply Co., Inc. v. U.S.*, 450 F. Supp. 469, 471 (S.D.N.Y. 1978).

In addition, many courts have applied a test whereby a determination is made as to whether the injustice caused

by the government's misconduct is sufficiently severe to outweigh the countervailing interest of the public not to be unduly damaged by the imposition of estoppel. See, *e.g.*, *Worley v. Harris*, 666 F.2d 417 (9th Cir. 1982); *U.S. v. Ruby Co.*, *supra*; *U.S. v. Wharton*, 514 F.2d 406 (9th Cir. 1975).

In applying the balancing test, it is relevant to consider whether the government action for which estoppel is sought constitutes discretionary action and whether estoppel would result in a charge on public funds or lands. See, *e.g.*, *Gressley v. Califano*, *supra*. As the Seventh Circuit discussed in *Gressley*, the choice by the government whether to enforce or not to enforce a right to sue is discretionary, whereas the government's implementation of a Congressional mandate to pay statutory benefits is non-discretionary. Accordingly, it may be concluded that if the government's action is non-discretionary, and if estoppel would result in a charge on public funds or lands, the courts will be more reluctant to estop the government than if the government action is discretionary and there would be no charge on public funds or land.

In summing up, it is useful to consider the efforts of commentators to synthesize the various analytical frameworks which courts have applied to consider assertions of equitable estoppel against the government.

> "Estoppel or no estoppel against the government was traditionally, and in some cases still is, made to depend upon the distinction between performance of a governmental as distinguished from a proprietary function, and upon the agent's conduct as within or beyond the scope of his authority in a particular situation. *In some recent cases, however, the courts have turned away from these traditional pigeonholes, and considered the basic question of what is justice in a*

> *particular situation*, concerning themselves only with determining whether the proper elements of an equitable estoppel were present, and whether recognition of the equities to estop the government will harm the public's interest."

Annotation, Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies, 27 A.L.R. Fed. 702, 710 (1976). (Emphasis added.)

Davis also subscribes to a view summarized in the language underscored above—that the critical test is "what does justice require under the circumstances?" Davis, 1982 Ad. Law Supp., *supra* at 252.

CONCLUSION

The problems confronting respondents arose from the conduct of the Secretary and the Secretary's intermediary, Travelers. Unless the doctrine of estoppel applies, the Secretary will inflict an injury and damage upon CHS, the individual respondents and the public, even though the situation arose directly from the acts and omissions of the Secretary and her agents. Our system of justice is premised on the concept of responsibility for one's own actions and this concept must be applicable to the administrative branch of government in its dealings with the public, as well as between members of the public. The concept that government should not be estopped is outmoded. That concept is socially unacceptable. What does justice in our present society require? If a government employee is negligent and his negligence causes a personal injury, the injured person is assured of recovery for his damages. So too where misleading governmental conduct has induced reasonable detrimental reliance, the government, like any other party, should be estopped to prevent an injury. Pos-

sibly some circumstances should require a court to withhold equitable relief, but it is difficult in even a limited way to perceive of such circumstances and the burden to prove such circumstances should rest with the government. The public would suffer unacceptable harm if the Secretary's views are adopted. No one could rely on the government. The Court of Appeals' decision should be affirmed.

Respectfully submitted,

RAYMOND G. HASLEY
BRIAN W. ASHBAUGH

ROSE, SCHMIDT, DIXON & HASLEY

900 Oliver Building
Pittsburgh, Pennsylvania 15222-5369
(412) 434-8600

Counsel for Respondents